

No. _____

In the Supreme Court of the United States

JOSH A. WAIRI,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the United States
Court of Appeals for the First Circuit**

PETITION FOR A WRIT OF CERTIORARI

**Raymond E. Gillespie, Esquire
Attorney for the Petitioner
CJA Appointed Counsel
875 Massachusetts Avenue Suite 32
Cambridge, MA 02139
(617) 661-3222
rgillespie1@prodigy.net**

QUESTION PRESENTED

1. Does the First Circuit Court of Appeals' decision in petitioner's case conflict with this Court's decisions in Booker v. United States, 543 U.S. 220 (2005) and Gall v. United States, 552 U.S. 38 (2007) which held, inter alia, that criminal sentences must be procedurally reasonable?

CITATION

United States v. Josh Wairi, No. 15-2166(1st Cir. May 30, 2018)(Slip Opinion), A true copy, attached, at Appendix A. ("App. ____").

JURISDICTION

The Court of Appeals had jurisdiction of this case under 18 U.S.C. § 1291. On May 30, 2018 it affirmed the judgment of the district court in all respects. Judgment entered on the same date.

PETITION FOR WRIT OF CERTIORARI

Josh A. Wairi (petitioner, defendant, Mr. Wairi) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on May 30, 2018 because it directly conflicts with this Court's decision in Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586 (2007)(appellate court "must first insure that the district court committed no significant procedural error, ...such as failing to consider the § 3553(a) factors..").

STATEMENT OF THE CASE

On April 17, 2014 petitioner was arrested at his home in Somerville, Massachusetts and charged with possession and transportation of child pornography. A subsequent superseding indictment charged him with those offenses as well as two counts of production of child

pornography and one count of attempted production of child pornography. On May 5, 2015 he was found guilty by a jury on the possession and transportation counts but acquitted on the three productions counts.¹ On September 14, 2015 he was sentenced to 144 months in prison to be followed by 8 years of Supervised Release with several special conditions.

On appeal to the First Circuit Court of Appeals he asserted that his sentence was both procedurally and substantively unreasonable in violation of this Court's decisions in Booker v. United States, 543 U.S. 220, 125 S. Ct. 738 (2005), Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586 (2007) and progeny. He alleged specifically that the district court failed to adequately consider an expert psychosexual evaluation which he had undergone. That report related its findings based on two industry-standard psychological and sexual interest tests² and concluded that he did not have any major psychiatric illness, thought or mood disorder and was not a fixated pedophile. It also indicated that Mr. Wairi could be managed in a very structured community-based intensive therapeutic program post completion of any sentence of imprisonment he should receive.³ Defense counsel thus argued for imposition of the five year minimum mandatory sentence required for the transportation conviction under 18 U.S.C. § 2252A(a)(1) and (b)(1), to run concurrent with similar time on the possession count plus ten years of supervised release. The Court of Appeals affirmed the judgment, holding that "The district court may have a duty [to] explain its choice of a particular sentence, but it has no duty

¹ The petitioner had offered to plead guilty to the possession and transportation counts but could not do so without also accepting guilt for production. Accordingly, counsel conveyed his admissions to the same during the trial and literally asked the jury to find him guilty on those counts. Sentencing Transcript at 15, Docket No. _____. The jury complied with his request.

² The Millon Clinical Multiaxial Inventory – III, and the Abel Assessment of Sexual Interest – 3 test.

³ The evaluation was filed under seal in the district court. It is listed as Appendix B herein, but not included herein pending action on a separate motion to file under seal to be filed.

to explain why it rejected other proposed sentences. [Citation omitted]. See Judgment, Appendix A ("App. A") p. 1.

ARGUMENT

I. THE FIRST CIRCUIT'S DECISION IS CONTRARY TO THE RULE FOLLOWED IN GALL V. UNITED STATES, THAT A SENTENCING COURT MUST CONSIDER ALL THE FACTORS IDENTIFIED IN 18 U.S.C. 3553(a).

The district court correctly calculated the defendant's guideline range at 36, after factoring in various enhancements from the child pornography guideline. Both the defendant and government accepted that calculation. The defendant, however, requested credit for acceptance of responsibility in spite of the fact that he had gone to trial. Over the government's objection, the court accepted that view because the defense had no option but to go to trial in order to possibly avoid a minimum mandatory 15 years for a production conviction. Thus, the final guideline calculation was 33 and, combined with a criminal history category of I as a first time offender, it yielded a guideline sentencing range of 135 to 168 months. Sent. Tr. 16, Docket # 166.

As the next step in the sentencing procedure, Gall requires the district court to "consider all of the § 3553(a) factors to determine whether they support a sentence requested by a party." 128 S. Ct. at 597. That of course includes "the history and characteristics of the defendant", 18 U.S.C. § 3553(a)(1). Pertinent here is that the defense had specifically requested in its sentencing memorandum a sentence of five years imprisonment to be followed by 10 years of supervised release which should include, *inter alia*, the kind of community-based therapy program described in the Psychosexual Evaluation submitted under seal by counsel. Appendix B. Specifically, counsel wrote,

"The psychosexual evaluation states that Joshua could be safely managed the community if he (a) participates in an outpatient sexual offender treatment program; (b) "participates[s] in

behavioral therapy to help him understand and his deviant sexual interests;” (c) explores his sexual identity with a psychologist; (d) does not have unsupervised access to the Internet; and (e) participates in regular polygraphs to ensure he is not engaging in inappropriate sexual behaviors.”

Defendant’s Sentencing Memorandum, Docket # 111, at 15-16.

The court did not mention the issue. The judge did say that he had “read everything that’s been submitted both on behalf of the government and the defense and I’ve thoroughly read the presentence report.” Id. at 17. But he did not address the evaluation at all, much less the recommendation that post incarceration community-based treatment was likely a safe option for the community and Josh. This conflicted with the directive in Gall that the sentencing court “must make an individualized assessment based on the facts presented.” 128 S. Ct. 597.

The failure to impose a truly individualized sentence is procedurally unreasonable. United States v. Flores-Machicote, 706 F. 3d 16, 24 (1st Cir. 2013)(“It is possible for a sentencing judge to focus too much on the community and too little on the individual and, thus, impose a sentence that cannot withstand the test of procedural reasonableness”). Such was the case here.

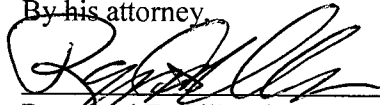
Conclusion

For the reasons stated above, the defendant, Josh A. Wairi, respectfully prays that his petition for certiorari be granted.

Respectfully submitted,

JOSH A WAIRI,

By his attorney,



Raymond E. Gillespie, Esquire
Appointed CJA Counsel for Petitioner
875 Massachusetts Ave Suite 32
Cambridge, MA 02139
(617) 661-3222
rgillespiel@prodigy.net